APPENDIX I - ATTORNEY GENERAL OPINIONS

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5507

June 29, 1979

SCHOOLS AND SCHOOL DISTRICTS:

Construction of addition to school buildings by vocational education students

LABOR:

Construction of addition to school buildings by vocational education students

PUBLIC CONTRACTS:

Construction of addition to school buildings by vocational education students

A board of education of a school district, other than a first and second class district, must obtain competitive bids on all material and labor required for the addition to an existing school building and, therefore, such a school district may not use vocational education students to build an addition to a school building.

Honorable Mary Brown

State Representative

The Capitol

Lansing, Michigan 48909

Mr. Stan Arnold

Construction Safety Commission

7150 Harris Drive

Lansing, Michigan 48926

You have requested my opinion on a question which may be stated as follows:

> Is the Bedford Board of Education required to pay the prevailing wage to its vocational education students who are building an 8,000 square feet addition to the senior high school?

The Superintendent of the Bedford School District has provided our office with the following background information:

> '1. The building project is financed from General Fund revenues. It is a State Department of Education approved Vocational Building Trades as such. A portion of the instructional costs are reimbursed under the socalled Added Cost formula. We have several other State Department of Education approved vocational programs subject to the same type of financial arrangement.
>
> '2. They are building a small addition of 8,000 square feet to our Senior High School. The addition will house areas for Distributive Education and first-year Vocational Building Trades.
>
> '3. Thirty students are working on the project.
>
> '4. Three class credits are awarded for successful completion of the subject.
>
> '5. Only students electing the subject take it.
>
> '6. As stated in the previous answer, it is an elective course. Further, as another part of our Vocational Building Trades subject offering, we have and are now building at least one residence. Students may be involved in this project rather than the addition to the high school.
>
> . . . No monetary remuneration is awarded and no student is required to take the course in order to graduate from our high school.'

The law is settled that boards of education have only such powers as are conferred upon them either expressly or by reasonably necessary implication by the Legislature. Senghas v L'Anse Creuse Public Schools, 368 Mich 557; 118 NW2d 975 (1963). In section 1287(1) of the School Code of 1976, 1976 PA 451, MCLA 380.1287(1); MSA 15.41287(1), the Legislature has provided that boards of education 'may establish, equip, and maintain vocational education programs and facilities.'

In responding to your inquiry, however, it is also necessary to examine the School Code of 1976, 1976

PA 451, Sec. 1267, MCLA 380.1267; MSA 15.41267. This provision, in pertinent part, states:

> '(1) The board of a school district other than a first or second class school district, prior to commencing construction of a new school building or addition to an existing school building, shall obtain competitive bids on all the material and labor required for the complete construction of a proposed new building or addition to an existing school building.
>
> '(2) The board shall advertise for the bids once each week for 2 successive weeks in a newspaper of general circulation in the area where the building or addition is to be constructed.
>
> '(5) This section does not apply to buildings and repairs costing less than $2,000.00.'

In OAG, 1961-1962, No 3440, p 55 (February 23, 1961), the Attorney General held that boards of education of school districts other than first and second class districts must take competitive bids for all alteration and repair contracts exceeding the sum of $2,000.00. That conclusion was based upon an analysis of the School Code of 1955, 1955 PA 269, and in particular, sections 370 and 371 thereof, which stated:

> 'Sec. 370. The board of any school district, except a school district of the first or second class, which desires to commence the construction of any new school building or addition to any existing school building, shall obtain competitive bids before such construction be commenced on all the material and labor required for the complete construction of the proposed new building or addition to any existing school building.
>
> 'Sec. 371. Such board shall advertise for the bids required in section 370 hereof once each week for 2 successive weeks in a newspaper of general circulation in the county where the building is to be constructed or the addition is to be made, and, if no newspaper is published in such county, then such advertisement shall be printed in a newspaper of general circulation published in an adjacent county: Provided, however, That the provisions of this section and of section 370 of this act shall not apply to buildings and repairs of less than $2,000.00.'

Sections 370 and 371 of the School Code of 1955 have been superseded by section 1267 of the School Code of 1976, supra. This new provision does not differ substantially from the prior sections 370 and 371, supra. Consequently, the School Code of 1976, Sec. 1267, supra, continues the rule that a board of education of a school district other than first and second class districts, prior to commencing construction on an addition to an existing school building, must obtain competitive bids on all the material and labor required for the addition to the existing school building.

Our office has been informed by the Superintendent of the Bedford School District that competitive bids, to date, have not been obtained on all the material and labor required for the addition to the senior high school. Therefore, the Board of Education of the Bedford School District must obtain competitive bids on the material and labor required for said addition pursuant to the terms of the School Code of 1976, Sec. 1267, supra. This statutory requirement for obtaining competitive bids precludes the construction of an addition to a school building by vocational education students since the competitive bidding requirement clearly contemplates the use of private contractors and their paid employees to build such projects.

Accordingly, the foregoing discussion obviates the need to address the prevailing wage question.

Frank J. Kelley

Attorney General

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5508

June 29, 1979

SCHOOLS AND SCHOOL DISTRICTS:

Payment of prevailing rates of wages and fringe benefits to employees

OFFICERS AND EMPLOYEES:

Payment of prevailing rates of wages and fringe benefits to school district employees

LABOR AND EMPLOYMENT:

Payment of prevailing rates wages and fringe benefits to school district employees

1965 PA 166, as amended by 1978 PA 100, does not require that employees of school boards be paid rates of wages and fringe benefits equal to that paid to construction workers of independent contractors.

Honorable Jack Faxon

State Senator

The Capitol

Lansing, Michigan 48909

Honorable Thomas Guastello

State Senator

The Capitol

Lansing, Michigan 48909

You have each requested my opinion on a question which may be rephrased as follows:

> Does 1965 PA 166, as amended by 1978 PA 100, require that employees of school boards be paid rates of wages and fringe benefits prevailing in the locailty in which the work is performed?

Following enactment of 1965 PA 166, MCLA 408.551 et seq; MSA 17.256(1) et seq, hereinafter the act [(1)], question arose at to its application to construction projects relating to school districts.

That issue came before Michigan's appellate courts in Bowie v Coloma School Board, 58 Mich App 233, 236; 227 NW2d 298 (1975). In that case the court said:

> 'At the outset, in construing this statute we are of the opinion that since it is in derogation of common law and since it provides for certain penalties in the event of violation, that it must be strictly construed. Having these precepts in mind, we must first seek to determine whether it was within the legislative intent that school districts should be included in and bound by the provisions of the statute. Under the principle of strict construction, the intent of the Legislature to include school districts within the statute must affirmatively appear.'

With respect to legislative intent, the court, at p 241, said:

> '. . . The statute does not disclose affirmatively that it was the legislative intent that 'school districts' were included within the provisions. The use of the term 'school districts' could easily have been made a part of the statute had such been the intent. . . .'

1978 PA 100 amended section 1 of the act to include school districts within tis purview. Specifically, Act 100 amended section 1 to read as follows:

> '(a) 'Construction mechanic' means a skilled or unskilled mechanic, laborer, worker, helper, assistant, or apprentice working on a state project but shall not include executive, administrative, professional, office, or custodial employees.
>
> '(b) 'State project' means new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, schools, works, bridges, highways, or roads authorized by a contracting agent.
>
> '(c) 'Contracting agent' means any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor.

> '(d) 'Commissioner' means the department of labor.
>
> '(e) 'Locality' means the county, city, village, township, or school district in which the physical work on a state project is to be performed.'

It will also be noted that 1965 PA 166, supra, Sec. 2, provides in pertinent part:

> 'Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. . . .'

The entire act is cast in terms of the enacting language which spells out as its purpose 'to require prevailing wage and fringe benefits on state projects.' Thus, the act is concerned with the relationship between public agencies and independent contractors who bid on projects. Its purpose is to assure that successful bidders on state projects pay the prevailing rates of wages and fringe benefits. Since the inclusion of schools within the definition of state projects and school boards within the definition of contracting agent, it is clear that schools are currently included within the requirement that independent contractors working on state projects must pay the rates of wages and fringe benefits prevailing in the locality in which the work is to be performed.

It should also be observed that the construction, reconstruction or remodeling of any school building or addition thereto is subject to the requirements of 1937 PA 306, MCLA 388.851 et seq; MSA 15.1961 et seq. Under this act, building plans must be submitted to the Superintendent of Public Instruction for his approval prior to construction. 1937 PA 306, supra, Sec. 1(a). All such plans must be prepared by and the construction supervised by a registered architect or engineer. 1937 PA 306, Sec. 1(a), supra. Further, 1937 PA 306, supra, requires approvals as to fire safety and health.

Your question, however, is directed to whether the prevailing rates and fringe benefits which are required to be paid to employees of contractors by virtue of 1965 PA 166, Sec. 2, supra. must also be paid to employees of a school board.

As amended, the act places the responsibility upon the contracting agent, i.e., the school board, to assure that the contracts between it and the bidders contain provisions requiring payment by the latter of rates of wages and fringe benefits prevailing in the locality in which the work is to be performed. The thrust of the act as to wage and fringe benefit payments is clear--it requires that contractors pay prevailing wages and fringe benefits. It is silent with respect to wages and fringe benefits paid by the public contracting agent, i.e., the school board, nor does the applicant of the act turn upon the type of work being performed.

With respect to the establishment of wages and fringe benefits of school employees, 1947 PA 336, Sec. 9 added by 1965 PA 397, MCLA 423.209; MSA 17.455(a), guarantees the right of all public employees to

form and join labor organizations and bargain collectively through representatives of their choice. See City of Escanada v Michigan Labor Mediation Board, 19 Mich App 273; 172 NW2d 836 (1969). Such bargaining may, of course, establish a scale of wage and fringe benefits which are less or greater than that prevailing in the locality where the work is performed.

Therefore, it is my opinion that 1965 PA 166, supra, as amended by 1978 PA 100, Sec. 1, supra, does not require that employees of school boards be paid rates of wages and fringe benefits equal to that of construction workers of independent contractors.

Frank J. Kelley

Attorney General

(1) Entitled 'AN ACT to require prevailing wages and fringe benefits on state projects; to establish the requirements and responsibilities of contracting agents and bidders; and to prescribe penalties.'

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5549

August 27, 1979

SCHOOLS AND SCHOOL DISTRICTS:

Construction contracts requiring payment of prevailing wages

LABOR:

Contracts on state projects requiring payment of prevailing wages

STATE:

Contract requiring payment of prevailing wages

The statute requiring payment of prevailing wages to employees of contractors working on state projects applies only to contracts entered into as a result of competitive bidding.

The Honorable John A. Welborn

State Senator

Capitol Building

Lansing, Michigan 48909

Dear Sir:

You have requested my opinion concerning the impact of 1965 PA 166, MCLA 408.551 et seq; MSA

17.256(1) et seq, on the following fact situation:

> 'I have recently been contacted by a small businessman in my district who does repair work. In the past, he has done small repair jobs at various schools, and various state facilities.
>
> He was then informed by one of his previous state customers, that he could continue to do repair work because he was not operating under a contract as required under Public Act 166 of 1965.
>
> 'He has no contracts with any of these facilities. They simply call him when something breaks down.
>
> 'My question is, does this type of activity fall under Act 166 of 1965 as amended by Act 100 of 1978? In other words, is this small businessman required to pay the prevailing wage if he does this type of work, or does the Act apply only to contracts which are let for bids?'

1965 PA 166, supra, Sec. 2 provides:

> 'Every contract executed between a contracting agency and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall not be less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. . . .' (Emphasis added)

Section 1267 of the School Code of 1976, MCLA 380.1267; MSA 15.41267, states that a board of a school district, other than a school district of the first or second class, shall obtain competitive bids on all material and labor required for the construction of a new school building or an addition to an existing school building. There is no statutory requirement that a school district obtain competitive bids where a person performs small repair jobs at various schools.

Where the language of the statute is plain and unambiguous, no interpretation is necessary. Acme Messenger Service Co v Unemployment Compensation Commission, 306 Mich 704, 11 NW2d 296 (1943); Ypsilanti Police Officers Association v Eastern Michigan University, 62 Mich App 87, 233 NW2d 497 (1975). The above quoted statutory language makes it abundantly clear that 1965 PA 166, supra, only applies to contracts entered into pursuant to the competitive bidding process.

It is, therefore, my opinion that where a person enters into a contract pursuant to competitive bidding, he must pay the prevailing wage required by the statute. However, 1965 PA 166, as amended by 1978 PA 100, supra, only applies to contracts entered into as a result of competitive bidding.

Frank J. Kelley

Attorney General

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5600

November 21, 1979

PUBLIC CONTRACTS:

Statute requiring payment of a prevailing wage and fringe benefit rates of the locality

When an owner of a private building remodels the building for occupancy for a public body, the owner is not subject to the provisions of 1965 PA 166 which requires payment of the prevailing wage and fringe benefit rates of the locality.

Honorable Debbie Stabenow

State Representative

The Capitol

Lansing, Michigan 48909

You have stated that the Ingham County Department of Social Services is currently leasing certain office facilities in Lansing, Michigan, which were remodeled by the lessor in keeping with the specifications required by the lease. Your also state that it is your understanding that the lessor, a private corporation, did not pay the prevailing wage and fringe benefit rates of the locality. Based upon these facts, you have requested my opinion on the following questions:

1. Has the lessor violated 1965 PA 166, as amended?

2. If a violation has occurred, what is the legal remedy?

1965 PA 166, Sec. 1, as last amended by 1978 PA 100, MCLA 408.551; MSA 17.256(1), provides in relevant part:

> '(a) 'Construction mechanic' means a skilled or unskilled mechanic, laborer, worker, helper, assistant, or apprentice working on a state project but shall not include executive, administrative, professional, office, or custodial employees.
>
> '(b) 'State project' means new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, schools, works, bridges, highways, or roads authorized by a contracting agent.
>
> '(c) 'Contracting agent' means any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor.'

Also pertinent to the questions you have raised in 1965 PA 166, Sec. 2, as amended by 1978 PA 100, MCLA 408.552; MSA 17.256(2), which provides:

> 'Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his sub-contractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. Contracts on state projects which contain provisions requiring the payment of prevailing wages as determined by the United States secretary of labor pursuant to the federal Davis-Bacon act (United States code, title 40, section 276a et seq.) or which contain minimum wage schedules which are the same as prevailing wages in the locality as determined by collective bargaining agreements or understandings between bona fide organizations of construction mechanics and their employers are exempt from the provisions of this act.'

Even while in the course of construction on leased land, the improvements become part of the land and belong to the landlord. Schneider v Bank of Lansing, 337 Mich 646; 60 NW2d 187 (1953). Also, a tenant is not liable for improvements made on leased premises by the landlord in the absence of a stipulation to that effect. 51 CJS, Landlord and Tenant, Sec. 407, p 1049.

The owner of property in the exercise of dominion over its property, may make the alterations to the premises in order to facilitate its use by a tenant. In such case, the lessor contracts for alternations and the public body is not a contracting party to the remodeling contract.

It is my opinion, therefore, that the owner of a private building is not subject to the provisions of 1965 PA 166, supra, as amended by 1978 PA 100, when it remodels a private building for occupancy by a public body.

My answer to your first questions obviates the necessity to answer your second question.

Frank J. Kelley

Attorney General

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6723

June 23, 1992

COLLEGES AND UNIVERSITIES:

Application of prevailing wage act

PREVAILING WAGE ACT:

Application to state colleges and universities

The prevailing wage act does apply generally to construction projects undertaken by state universities, regardless of the source of funding for the projects.

The prevailing wage act does apply specifically to the renovation and addition to the student recreational facility to be built by Western Michigan University.

Honorable Mary Brown

State Representative

The Capitol

Lansing, Michigan

You have requested my opinion on two questions, both of which concern the prevailing wage act, 1965 PA 166, MCL 408.551 et seq.; MSA 17.256(1) et seq. Your questions may be stated as follows:

1. Does the prevailing wage act apply generally to construction projects undertaken by state universities?

2. Does the prevailing wage act apply specifically to the renovation and addition to the student recreational facility to be built by Western Michigan University?

Western Michigan University is a constitutional body corporate established by Const1963, art 8, Sec. 6. The Board of Trustees of the University has announced plans to renovate and to construct an addition to the University's existing Gary Student Recreation Center and Read Field House. I am advised that the existing facility was constructed on property donated to the University by the City of Kalamazoo and was financed entirely by bonds issued by the University and secured by student fees; no portion of the existing facility was financed with funds appropriated to the University by the Michigan Legislature. The University intends to finance the renovations and additions to this facility entirely out of the proceeds from a special student activity fee which it has begun imposing upon all students. The funds raised by this fee will be segregated in a separate account and will not be commingled with any other funds received by the University.

STATUTORY ANALYSIS

The prevailing wage act requires that certain contracts for state projects must contain a provision obligating the contractor to pay wages and fringe benefits to construction employees at a rate which is not less than the rate prevailing in the locality where the construction is to occur. MCL 408.552; MSA 17.256 (2). The applicable prevailing wage and fringe benefit rates are determined by the Michigan Department of Labor based upon an examination of local collective bargaining agreements and other "understandings" or contracts between local contractors and their construction employees. MCL 408.554; MSA 17.256(4).

The fundamental mandate of the prevailing wage act is set forth in section 2 of the act, MCL 408.552; MSA 17.256(2), which provides, insofar as it is pertinent here, that:

> Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. [Emphasis added.]

A contractor's failure to comply with this requirement is punishable as a misdemeanor. MCL 408.557; MSA 17.256(7).

The application of the prevailing wage act to the University, and to this particular project, therefore, turns upon whether the project is a "state project" and whether it is "sponsored or financed in whole or in part by the state," within the meaning of section 2, supra.

Section 1(b) of the act, MCL 408.551(b); MSA 17.256(1)(b), provides the following definition of the

term "state project" as it is used in the act:

> (b) "State project" means new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, schools, works, bridges, highways, or roads authorized by a contracting agent.

The term "contracting agent," in turn, is defined by section 1(c), MCL 408.551(c); MSA 17.256(1)(c), as follows:

> (c) "Contracting agent" means any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor. [Emphasis added.]

As the Legislature has not defined the term "state institution" in the prevailing wage act, the term is to be given its plain and ordinary meaning. Shelby Twp v Dep't of Social Services, 143 MichApp 294, 300; 372 NW2d 533 (1985); lv den 424 Mich 859 (1985).

Each of the constitutional provisions relating to the state universities (Const1963, art 8, Secs. 4, 5 and 6) expressly refers to these entities as "institutions" or "institutions of higher education." Further, the Legislature has implemented these constitutional provisions with regard to Central, Eastern, Northern and Western Michigan Universities in 1963 (2nd ExSess) PA 48, MCL 390.551 et seq; MSA 15.1120(1) et seq. In section 1 of that act, the four universities are described as "the established state institutions" known by those names. Finally, the Legislature is required to appropriate funds to maintain the state universities by Const1963, art 8, Sec. 4, and does so on an annual basis. See, e.g., 1991 PA 123. Clearly, a state university is a "state institution supported in whole or in part by state funds" within the plain and ordinary meaning of MCL 408.551(c); MSA 17.256(1)(c), supra, and therefore may constitute a "contracting agent" for purposes of the prevailing wage act.

This office has been advised that the University of Michigan and Michigan State University pay the prevailing wage on their state construction projects. This office has also been advised that the Department of Labor has long taken the position that the prevailing wage act applies to the state universities.

> " 'The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not be overruled without cogent reasons.' "

Bd of Education of Oakland Schools v Superintendent of Public Instruction, 401 Mich 37, 41; 257 NW2d 73 (1977). [Citing United States v Moore, 95 US 760, 763; 24 LEd2d 588 (1877).]

Thus, a construction project undertaken by a state university is a "state project" and is subject to the prevailing wage act if the project is "sponsored or financed in whole or in part by the state." MCL 408.552; MSA 17.256(2).

If the Legislature directly appropriates funds for a university construction project, the project would clearly qualify as a "state project" which is "sponsored or financed ... by the state." [(1)] Direct legislative

appropriation of funds is not, however, the only means by which a project can be sponsored or financed by the state. In West Ottawa Public Schools v Director Dep't of Labor, 107 MichApp 237; 309 NW2d 220 (1981), lv den, 413 Mich 917 (1982), for example, the state did not directly appropriate any funds for the project in question but did act as a surety for the payment of bonds issued to finance the project. The Court held that this was sufficient to constitute "sponsorship" within the meaning of the prevailing wage act. In reaching this conclusion, the Court defined "sponsor" as "one who assumes responsibility for some other person or thing." 107 MichApp at 247-248.

The board of control of a state university assumes responsibility for any construction project undertaken by the university and the university, thus, is the "sponsor" of the project. State universities are clearly a part of state government in Michigan. Regents of the University of Michigan v Employment Relations Comm, 389 Mich 96, 108; 204 NW2d 218 (1973); Branum v Bd of Regents of University of Michigan, 5 MichApp 134, 138-139; 145 NW2d 860 (1966). (2) Thus, a construction project undertaken by a state university and financed with the university's funds is a "state project" and is "sponsored or financed in whole or in part by the state" within the plain meaning of the prevailing wage act.

CONSTITUTIONAL ANALYSIS

This does not end our inquiry, however. It remains necessary to address the impact, if any, of Const1963, art 8, Secs. 5 and 6 upon your questions. These two provisions of the Michigan constitution expressly grant to the governing board of each state university the "general supervision of the institution and the control and direction of all expenditures from the institution's funds." In light of this grant of authority, "[t]he powers and prerogatives of Michigan universities have been jealously guarded not only by the boards of those universities but by [the Michigan Supreme] Court in a series of opinions running as far back as 1856." Bd of Control of Eastern Michigan University v Labor Mediation Bd, 384 Mich 561, 565; 184 NW2d 921 (1971). Thus, in Weinberg v Regents of the University of Michigan, 97 Mich 246, 255; 56 NW 605 (1893), the Court reviewed a state statute which purported to require all Michigan public bodies, when contracting for the construction of a public building, to require their contractors and subcontractors to post bonds sufficient to assure payment of all labor and material costs. Citing the constitutional autonomy of the University Regents, the Court concluded that the statute could not constitutionally be applied to the University. Accord, William C Reichenbach Co v Michigan, 94 MichApp 323; 288 NW2d 622 (1979). See also, OAG, 1989-1990, No 6602, p 226 (October 4, 1989).

More recently, however, the Michigan Supreme Court has recognized that the constitutional independence of the state universities is not absolute. In Regents of the University of Michigan v Employment Relations Comm, supra, for example, the Court was confronted with the question of whether the Michigan Public Employees Relations Act (PERA), MCL 423.201 et seq; MSA 17.455(1) et seq, applied to the University of Michigan. Addressing the constitutional provisions assuring the independence of the University's Board of Regents, the Court stated, 389 Mich at 107:

> This concern for the educational process to be controlled by the Regents does not and cannot mean that they are exempt from all the laws of the state. When the University of Michigan was founded in the 19th Century it was comparatively easy to isolate the University and keep it free from outside interference. The complexities of modern times makes this impossible.

The Court went on to state, Id at 108:

> We agree with the reasoning of the Court of Appeals in Branum v Board of Regents of University of Michigan, 5 MichApp 134 (1966). The issue in that case was whether the Legislature could waive governmental immunity for the University of Michigan because it was a constitutional corporation. The Court of Appeals stated (pp 138-139):
>
> "In spite of its independence, the board of regents remains a part of the government of the State of Michigan.
>
> "It is the opinion of this Court that the legislature can validly exercise its police power for the welfare of the people of this State, and a constitutional corporation such as the board of regents of the University of Michigan can lawfully be affected thereby. The University of Michigan is an independent branch of the government of the State of Michigan, but it is not an island. Within the confines of the operation and the allocation of funds of the University, it is supreme. Without these confines, however, there is no reason to allow the regents to use their independence to thwart the clearly established public policy of the people of Michigan."

PERA, the Court noted, was adopted pursuant to the Legislature's authority over public employee labor relations, an authority expressly recognized by article 4, Sec. 48 of the 1963 Constitution. In light of this newly adopted constitutional provision, PERA represented the clearly established public policy of the state and was, therefore, applicable to the University. Id, at 107. This conclusion, the Court indicated, did not interfere with the constitutional autonomy of the Regents since that autonomy lies primarily within the educational sphere. Id, at 109-110. See also, Bd of Control of Eastern Michigan University, supra, 384 Mich at p 566.

This analysis applies with equal force to the provisions of the prevailing wage act. Const1963, art 4, Sec. 49, provides:

> The legislature may enact laws relative to the hours and conditions of employment.

The term "conditions of employment" has been found to include matters relating to wages and fringe benefits. Fort Stewart Schools v Federal Labor Relations Authority, 495 US 641, 650; 110 SCt 2043; 109 LEd2d 659 (1990). Thus, pursuant to Const1963, art 4, Sec. 49, the determination of public policy in the area of hours and conditions of employment, including wages, is expressly vested in the Legislature. The prevailing wage act is plainly an exercise of that legislative authority. That this act represents the clear public policy of the state was explicitly recognized by the Court of Appeals in West Ottawa, supra, 107 MichApp, at 245, where the Court stated that:

> The Legislature has declared as the policy of this state that construction workers on public projects are to be paid the equivalent of the union wage in the locality.

The prevailing wage act applies generally to all construction projects in which the state is involved through sponsorship or funding. Because that act is a legislative exercise of the police power expressing

the clearly established public policy of the state, it may be applied to state universities without violating their constitutional autonomy.

CONCLUSION

It is my opinion, therefore, in answer to your first question, that the prevailing wage act does apply generally to construction projects undertaken by state universities, regardless of the source of funding for the projects. It is also my opinion, in answer to your second question, that the prevailing wage act does apply specifically to the renovation and addition to the student recreational facility to be built by Western Michigan University.

Frank J. Kelley

Attorney General

(1 I am advised that, consistent with this conclusion, Western Michigan University has in the past complied with the requirements of the prevailing wage act on all projects which have utilized legislatively appropriated funds)

(2 It is noted that several cases have reached a contrary result with respect to local school districts) See, e.g., Bowie v Coloma School Bd, 58 MichApp 233; 227 NW2d 298 (1975) and Muskegon Bldg & Constr Trades v Muskegon Area Intermediate School Dist, 130 MichApp 420; 343 NW2d 579 (1983); lv den 419 Mich 916 (1984). These cases are clearly distinguishable, however, since school districts have been characterized as municipal corporations and are not part of state government. See, e.g., Bowie, supra, 58 MichApp at 239. State universities, in contrast, are institutions of state government. Regents of the University of Michigan, supra; Branum, supra.

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State of Michigan, Department of Attorney General
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STATE OF MICHIGAN

JENNIFER M. GRANHOLM, ATTORNEY GENERAL

PUBLIC CONTRACTS:

PUBLIC SCHOOL ACADEMIES:

SCHOOLS AND SCHOOL DISTRICTS:

WAGES AND FRINGE BENEFITS:

Payment of prevailing wages on construction and remodeling of public school academy school buildings

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Under the Wages and Fringe Benefits on State Projects Act, a contract for construction or remodeling of a school building authorized by a public school academy pursuant to bid, sponsored or financed in whole or in part by state funds, and using construction mechanics, must provide for the payment of prevailing wages.

Opinion No. 7057

July 19, 2000

Honorable Michael J. Hanley
State Representative
The Capitol
Lansing, MI 48913

You have asked if, under the Wages and Fringe Benefits on State Projects Act, a contract for construction or remodeling of a school building, authorized by a public school academy pursuant to bid, supported or financed in whole or in part by state funds, and using construction mechanics, must provide for the payment of prevailing wages. The answer to this question requires an analysis of both the statute you cite and the Revised School Code.

The Wages and Fringe Benefits on State Projects Act (Prevailing Wage Act), 1965 PA 166, MCL 408.551 *et seq*; MSA 17.256(1) *et seq*, requires prevailing wages and fringe benefits on state projects, and establishes requirements and responsibilities of contracting agents and bidders. Section 503(6)(d) of the Revised School Code (Code), 1976 PA 451, MCL 380.1 *et seq*; MSA 15.4001 *et seq*, states that a public school academy shall "comply with" the provisions of the Prevailing Wage Act. In *Western Michigan Univ Bd of Control v Michigan*, 455 Mich 531, 536; 565 NW2d 828 (1997), the Michigan Supreme Court articulated the elements that bring a project within the Prevailing Wage Act:

> [A] project must: (1) be with a "contracting agent," a term expressly defined in the act; (2) be entered into after advertisement or invitation to bid; (3) be a state project, a term also defined in the act; (4) require the employment of construction mechanics; and (5) be sponsored or financed in whole or in part by the state.

The Prevailing Wage Act expressly includes a "school board" within its definition of "[c]ontracting agent." Section 1(c). A public school academy is a public school under Const 1963, art 8, § 2, and a school district for purposes of Const 1963, art 9, § 11. Code, section 501(1). The Michigan Supreme Court has confirmed that public school academies are public schools, subject to general supervision of the State Board of Education "to the same extent as are all other public schools." *Council of Organizations and Others for Education About Parochiaid, Inc v Governor*, 455 Mich 557, 583-584; 566 NW2d 208 (1997); OAG, 1997-1998, No 6956, p 72 (September 23, 1997). The board of directors of a public school academy is a school board and a contracting agent within the purview of the Prevailing Wage Act, thus satisfying the requirements of the first element.

Turning to the second element requiring advertisement or invitation to bid, the Code requires the board of directors of a public school academy, seeking to construct[1] a new school building or to repair or renovate an existing school, to seek and obtain "competitive bids" on all material and labor costs. Section 1267(1). If the costs are less than $12,500, or the repair work is normally performed by school employees, no bids are required. Section 1267(6). Thus, the board of directors of a public school academy must seek bids for the

construction or remodeling of its school buildings, provided that the cost is $12,500 or more. This statutory requirement satisfies the second element of a project entered into after "invitation to bid."

The third element of the Prevailing Wage Act expressly includes public "schools" within its definition of state project. Section 1(b). A public school academy is a public school. Code, section 501(1). *Council of Organizations, supra*, 455 Mich at 583. Thus, the Act's third element is satisfied.

The fourth element of the Prevailing Wage Act requires the employment of construction mechanics, other than employees in the state classified civil service, to construct or renovate the proposed project. This is a factual question to be resolved for each individual project, and is not appropriate for resolution by the Attorney General's opinion process.

The fifth and final element of the Prevailing Wage Act requires that the project be "sponsored or financed in whole or in part by the state." Section 2. In *Western Michigan Univ, supra*, at 539, the Michigan Supreme Court, citing OAG, 1991-1992, No 6723, p 156 (June 23, 1992), analyzed what constitutes state sponsorship of a project and concluded:

> We find no ambiguity in the prevailing wage act's threshold requirement that a project must be "sponsored or financed in whole or in part by the state." No construction of these terms is required. If the "state," including any part of state government, helps to finance a project, or undertakes some responsibility for a project, this criterion is met. Because we agree with the analysis of the Attorney General regarding whether the state has sponsored or financed a project in whole or in part, specifically regarding the university's project at issue in this case, we will set forth that analysis here:
>
> > Direct legislative appropriation of funds is not . . . the only means by which a project can be sponsored or financed by the state. In *West Ottawa Public Schools v Director, Dep't of Labor*, 107 Mich App 237; 309 NW2d 220 (1981), lv den 413 Mich 917 (1982), for example, the state did not directly appropriate any funds for the project in question but did act as a surety for the payment of bonds issued to finance the project. The Court held that this was sufficient to constitute "sponsorship" within the meaning of the prevailing wage act. In reaching this conclusion, the Court defined "sponsor" as "one who assumes responsibility for some other person or thing."

With regard to funding, the Legislature has authorized a public school academy to receive state school aid payments. Pupils in attendance at a public school academy entitle the academy to receive the foundation allowance[2] for each pupil, payable by the state to the authorizing body as fiscal agent for the public school academy. See for example, sections 20(2), 20(6), 20(7), 51a(2)(a), and 51a (12) of the State School Aid Act of 1979, 1979 PA 94, MCL 388.1601 *et seq*; MSA 15.1919(901) *et seq*. These state school aid payments are paid to the public school academy in accordance with section 507(1) of the Code. Not more than 20% of the total foundation allowance received by the academy may be transferred to a capital projects fund. Section 18(1) of the State School Aid Act of 1979. Monies in such fund would presumably be used by a public school academy to pay for the construction of new school buildings or the remodeling of existing school buildings. Since the governing body of a public school academy has no taxing authority, it is reasonable to assume that funds needed to pay for construction or remodeling of its school buildings would come from state school aid payments received by the academy. In that event, the academy's construction or remodeling of its school buildings would be sponsored or financed, in whole or in part, with state funds.[3]

It is my opinion, therefore, that under the Wages and Fringe Benefits On State Projects Act, a contract for construction or remodeling of a school building authorized by a public school academy pursuant to bid, supported or financed in whole or in part by state funds, and using construction mechanics, must provide for the payment of prevailing wages.

JENNIFER M. GRANHOLM
Attorney General

[1] It is noted that the board of directors of a public school academy is empowered to "acquire" school buildings. Code, section 503(9). There is authority that holds the grant of power to acquire buildings includes the power to construct them. *Ronnow v City of Las Vegas*, 57 Nev 332; 65 P2d 133, 139 (1937); *Clark v City of Los Angeles*, 160 Cal 30; 116 P 722, 729 (1911); *King v Independent School Dist*, 46 Idaho 800; 272 P 507 (1928); *Verner v Muller*, 89 SC 117; 71 SE 654, 655-656 (1911). The commonly understood meaning of "remodel" is to reconstruct. *Webster's Third New International Dictionary Unabridged Edition* (1964). *Guadalupe County Bd of Comm'rs v State*, 43 NM 409; 94 P 2d 515, 518 (1939). Thus, remodeling of a school building would be within the grant of authority to the public school academy board of directors.

[2] The foundation allowance is set each year by the Legislature as part of the state aid payments each school district receives.

[3] The board of directors of a public school academy is empowered to receive grants or gifts. Revised School Code, section 504a(b). If the board were to construct or remodel a school building entirely with a gift or grant monies not sponsored or financed by state funds, a different conclusion may be required. See *Muskegon Building and Construction Trades v Muskegon Area Intermediate School Dist*,

130 Mich App 420, 435-436; 343 NW2d 579 (1983), overruled in part by *Western Michigan Univ, supra*.

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return this to me. Thanks! [initials] DOL 6965

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MICHIGAN DEPT. OF LABOR
OCT 20 1988
DEPUTY DIRECTOR'S OFFICE

October 13, 1988

Elizabeth Howe, Director
Michigan Department of Labor
309 North Washington
Lansing, MI 48909

Dear Director Howe:

You have asked two questions concerning the wages and fringe benefits on state projects act (Act) MCL 408.551 et seq; MSA 17.256(1) et seq, which, by its title, requires prevailing wages and fringe benefits on state projects and establishes the requirements and responsibilities of contracting agents and bidders. Your first question may be stated as follows:

> Are Construction Industry Advance Program (CIAP) payments a fringe benefit under the provisions of MCL 408.551 et seq; MSA 17.256(1) et seq?

You have informed me that many construction industry contracts include a provision for CIAP payments and require employers to pay a sum into the program for every hour worked by employees covered by the contracts. The purposes of the program are to help prevent accidents in the industry, to provide education to benefit the industry, to undertake research into new methods and materials, and to generally benefit the construction industry.

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MCL 408.552; MSA 17.256(2), provides in pertinent part:

> "Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics, other than those subject to the jurisdiction of the state civil service commission, and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed...."

In order to answer your question, it is necessary to determine the meaning of the term "fringe benefit." While there is no Michigan case on point, the term "fringe benefit" was discussed by the court in City & County of San Francisco v Callanan, 169 Cal App 3d 643, 648; 215 Cal Rptr 435, 437-438 (1985). The court cited Webster's Third New International Dictionary for the definition of the term to mean "'an employment benefit (as a pension, a paid holiday, or health insurance) granted by an employer that involves a money cost without affecting basic wage rates.'" It also quoted from Trinity Services, Inc v Marshall, 593 F2d 1250; 193 US App DC 96 (1978), as follows:

> "'[That is,] to provide the benefit, the employer must make a payment to the employee (or to a fund maintained in the employee's behalf) for the present or future use of the employee (or his beneficiary), allow the employee to accrue some form of deferred compensation (such as vacation time), or incur the risk of granting the benefit to the employee (or his beneficiary) at some future time (such as compensation for injuries or illness from occupational activity).'"

Furthermore, MCL 408.471(e); MSA 17.277(1)(e), defines, for the purposes of the Act, "fringe benefits" as

> "compensation due an employee pursuant to a written contract or written policy for holiday, time off for sickness or injury, time off for personal reasons or vacation, bonuses, authorized expenses incurred during the course of employment, and contributions made on behalf of an employee."

In Construction Advancement Programs of North Central & East Central Ohio v A. Bentley & Sons Co, 45 Ohio App 2d 13; 340 NE2d 849 (1975), the court was required to determine whether payments to the Construction Advancement Program (CAP) pursuant to collective bargaining agreements constituted a fringe benefit. The purposes of this program were similar to those of the CIAP, and included promotion of safety, public education as pertaining to the construction industry, market development, and other activities to promote the common good of the construction industry. In holding that CAP payments were not a fringe benefit, the court quoted from the trial court's findings of fact as follows:

> "'[T]he [trial] Court finds that CAP conferred no benefits on the members of the union and that CAP is not a working condition or a fringe benefit for the union members but rather, ... that it is a typical industry promotion fund. While it may confer some incidental benefit on union members or on the general public, it is primarily for the benefit of the contractor.'" 340 NE2d at 852.

It is clear that CIAP payments do not fall within the commonly acknowledged fringe benefits such as vacation or sick time; nor are they paid directly to the employees. While it may be contended that they constitute "contributions made on behalf of an employee," the court in Bentley, supra, made it clear that this incidental type of benefit would not transform these payments into a fringe benefit when the primary beneficiary is the construction industry.

Since there is no judicial precedent on point in this state, it is not possible to predict how the issue would be dealt with if it arose in this jurisdiction. However, if a Michigan court was presented with a factual situation similar to the Bentley case, I believe it would conclude, in answer to your first question, that CIAP payments are not a fringe benefit under the provisions of MCL 408.551 et seq; MSA 17.256(1) et seq.

Your second question may be stated as follows:

Is the Department of Labor authorized, pursuant to MCL 408.551 et seq; MSA 17.256(1) et seq, to establish a permissible ratio of apprentices to journey persons on construction projects which are subject to this Act?

The term "fringe benefit" has been defined in the discussion of your first question. MCL 408.471(f); MSA 17.277(1)(f), defines the term "wages" as "all earnings of an employee whether determined on the basis of time, task, piece, commission, or other method of calculation for labor or services except those defined as fringe benefits under subdivision (e) above [MCL 408.471(e); MSA 17.277(1)(e))." In Cookes v Lymperis, 178 Mich 299, 304; 144 NW 514 (1913), the term "wages" was defined as "compensation given or to be given by a master or employer to a hired person or employee, by the hour, day, week, or month, the amount to be ascertained by agreement or the proven going rate or market value of the same at the time and place rendered."

Where the Legislature uses certain and unambiguous language, the plain meaning of the statute must be followed. Browder v Int'l Fidelity Ins Co, 413 Mich 603, 611; 321 NW2d 668 (1982). Additionally, in Bowie v Coloma School Bd, 58 Mich App 233, 236; 227 NW2d 290 (1975), the court held that MCL 408.551 et seq; MSA 17.256(1) et seq, must be strictly construed. The Department of Labor is specifically authorized to establish prevailing wages and fringe benefits on state projects. However, there is no indication in MCL 408.551 et seq; MSA 17.256(1) et seq, that the Department of Labor is authorized to establish a permissible ratio of apprentices to journey persons, nor that such a ratio comes within the meaning of "wages" or "fringe benefits".

It is my opinion, in answer to your second question, that the Department of Labor is not authorized, pursuant to MCL 408.551 et seq: MSA 17.256(1) et seq, to establish a permissible ratio of apprentices to journey persons on construction projects which are subject to this Act.

Very truly yours

FRANK J. KELLEY
Attorney General